No. 11634

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. D. KECK and HARRY K. STAHLER, and E. A. EMERSON and LEWIS EMERSON, husband and wife,

Appellants,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORATION, a corporation,

Appellee.

BRIEF OF APPELLANTS

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

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SUBJECT INDEX

Page

STATEMENT OF THE CASE 3

QUESTIONS PRESENTED 7

SPECIFICATIONS OF ERROR 7

ARGUMENT 7

LIABILITY OF SELLER FOR BREACH OF WARRANTY .. 9

LIABILITY OF SELLER FOR TORT IN THE SALE OF A PRODUCT 10

THE WASHINGTON CASES 14

TABLE OF CASES

Baxter vs. Ford Motor Co., 168 Wash. 456, 12 P. 2d, 409, 15 P. 2d, 1118 ..... 15, 23

Bock vs. Truck & Tractor, Inc., 18 Wash. 2d, 458, 139 P. 2d, 706 ..... 12, 16

Cochran vs. McDonald, 23 Wash. 2d, 348; 161 P. 2d, 305 19

Dobbin vs. Pacific Coast Coal Co., 25 Wash. 2d, 190; 170 P. 2d, 642 21

Ebers vs. General Chemical Co., 310 Mich. 261, 17 N. W. 2d, 176 ..... 11, 12, 24

E. I. Du Pont de Nemours & Co. vs. Baridon, 73 F. 2d, 26 (CCA 8th Circuit) 11, 24

Kramer vs. Carbolineum Wood Preserving Co., 105 Wash. 401; 177 Pac. 771 17

Mazetti vs. Armour & Co., 75 Wash. 622; 135 Pac. 633 ..... 9, 11, 14

STATUTES

U. S. C. A., Title 28, Sec. 225 (a) 2

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BRIEF OF APPELLANTS

These actions were commenced in the Superior Court of the State of Washington in and for Yakima County, but were removed by the Appellee, the defendant below, to the District Court of the United States for the Eastern District of Washington, Southern Division, since the amount involved exceeded Three Thousand Dollars ($3,000.00), and the defendant was a corporation of the State of California, whereas the plaintiffs were residents of the State of Washington.

The two causes were consolidated for trial and for appeal by stipulation and order. (R. 268-9).

The cases were tried before the Honorable Samuel M. Driver, Judge of said United States District Court at Yakima, Washington, on January 27, 28 and 29, 1947, before a Jury. (R. 22 et seq.).

After both parties had rested, the defendant challenged the sufficiency of the evidence and moved for a direct verdict, which motion was granted and the Jury was directed to return a verdict in favor of the defendant. (R. 262-267). Subsequently, judgment was entered on the verdict and thereafter a motion for new trial was filed and overruled. (R. 268, 9; 272, 3).

Notice of Appeal was filed by the plaintiffs on the 16th day of April, 1947. (R. 283). The record of Appeal was certified by the Clerk of the District Court on the 19th day of May, 1947. (R. 292). The jurisdiction of this court is invoked under Sec. 128 of the Judicial Code as amended, 28 U. S. C. A., Sec. 225 (a).

STATEMENT OF THE CASE

Appellants are owners and operators of apple orchards in the Yakima Valley, State of Washington. These orchards are planted principally to Jonathan and Delicious apples. (R. 29, 153, 154).

The appellee, California Spray-Chemical Corporation is a wholesaler of spray materials in the Yakima Valley. It does not engage in the retail business, but sells only to other distributors and retailers. (R. 176, 7). It maintains a staff of field representatives, who are trained men with years of education and experience in connection with the problems of spray and spray materials. (R. 25). These men are employed for the purpose of advising the growers of the valley on problems of spray procedure, formulas and programs, and "to put out reliable information to our users" (R. 211), and for the purpose, of course, of stimulating the sale of the products handled by the California Spray-Chemical Corporation. (R. 25). The head or chief of this staff is Dr. Regan, an entomologist by education and by experience, who likewise is employed to give such advice to growers and to organize appellants' program of approach to its market. (R. 25). Although the appellee does not sell directly to the user of this spray material, that is, the grower, but only to other distributors and retailers, its field representatives contact the growers personally, advising with them personally, concerning their particular problems on their orchards and giving advice and recommendations concerning the products handled by the appellee. (R. 25, 211, 212). The company also reaches

out to the grower by means of a little periodical called the Ortho News (R. 211).

In the April 17, 1945, issue of Ortho News (Pls. Exhibit B) it is said: "Whenever in doubt or where a special spray schedule is desired to meet unusual conditions, consult our nearest office or your 'Ortho Field Service Man.' "

In the spring of the year 1945, while the trees were still dormant, both appellants decided that their orchards needed some protection from mildew (which had not yet affected their crops materially but might do so in a few years if left uncontrolled) (R. 65, 66, 67, 122, 123, 132). Appellants contacted a representative of the Yakima Valley Farmers' Supply Company, a retail concern, about mildew control and the use of a product known as "Elgetol 30" in that connection. (R. 33).

"Elgetol 30" is not manufactured by the appellee but by the Standard Agriculturists, Inc., of Hoboken, New Jersey. It is a di-nitro material designed as a dormant spray and is therefore a stronger or more caustic spray than one used after the blossoms have commenced to bud out. The manufacturer cautions the user, if in doubt, whether the trees are still in a dormant stage, to consult with his dealer or experiment station before spraying. (R. 107; Pls. Ex. J.).

The standard treatment used for years in the Yakima Valley for the control of mildew is the so-called lime and sulphur spray applied in the "pink" stage of the blossoms, and again applied in the "calyx" stage. (R. 109). The disadvantage of the

lime and sulphur spray is that it delays the application of the summer oil spray, one of the methods used in the control of the codling moth. (R. 93, 211. Pl's Ex. B).

The representative of the Yakima Farmer's Supply Company referred appellants to Dr. Regan of the California Spray-Chemical Corporation. Dr. Regan recommended the use of "Elgetol 30" as an effective mildew control. (R. 33, 124).

Pursuant to such recommendation, the appellants purchased "Elgetol 30," secured directions from Dr. Regan on its application and applied the same in the "pink" stage to their apple trees. (R. 32, 33, 75). Within a few days appellants observed some burn upon the new leaves and some of the blossoms, and became worried concerning the further application of Elgetol. Appellant requested Dr. Regan to come to his orchard. Dr. Regan surveyed the orchards and advised appellants that the Elgetol was working fine and that the little burn that was apparent was merely evidence that the Elgetol was attacking the mildew and destroying it, and *specifically advised it be applied again in the Calyx.* (R. 32-40; 124-128).

Appellant relied upon such recommendations and instructions and again applied Elgetol in the "calyx" stage and within a very short time thereafter and as a result of the application of said spray, blossoms on the trees were burnt brown, the leaves to a large extent was destroyed and the crop of that year very materially reduced. (R. 39-40; 128).

Appellants read the Ortho News and relied upon the recom-

mendations and representations therein contained as well as the oral representations of Dr. Regan in the use of Elgetol. (R. 75, 80, 124) (Ex. F).

The evidence showed that the appellants did not buy the Elgetol directly from the California Spray-Chemical Corporation, but from a retailer who had purchased it from the California Spray-Chemical Corporation. (R. 32, 33, 75, 176, 177). The evidence also showed that the application of Elgetol in the "pink" and in the "calyx" as a mildew control had never been tested in the Yakima Valley or any place else prior to 1945, (S. R. P. 1 et seq.) and in that year, when it was first used as a mildew control a heavy loss was sustained throughout the Valley. Elgetol had been used only one year before in the Valley and then as a chemical thinner, not as a mildew control, and was applied at a different stage of the bloom. (R. 110, 188, 187, 190, 236, 293, 294, 296, 297, 298, 299 and 105, and Sup. R. P. 1 et seq.) When used as a chemical thinner Elgetol was applied not at the "pink" or "calyx" stage of the blossom, but at full bloom stage after the king blooms (the principal bloom in each cluster) had set fruit, but before the remaining blossoms had set for the purpose of destroying the unset blossoms and thus rendering thinning by hand later in the season unnecessary. (R. 93, 94, 96, 99, 101, 239). Testimony showed that with a material of this kind it was necessary to test the same for a period of from three to five years in order to determine its true characteristics, and to know whether it is safe. (R. 90, 109, 110, 119, 103).

QUESTIONS PRESENTED

1.

In an action for damages for loss of apple crop for negligence in recommending and selling a spray as a mildew control at a time when the appellee knew or should have known that the product was dangerous and knew that the product had not been tested for a sufficient number of years to determine its characteristics, can there be a recovery against a wholesaler *with whom plaintiff is not in privity* where the wholesaler directly contacts the plaintiff and recommends and represents the product to be suitable for the purpose intended, which product was manufactured for a wholly different purpose?

SPECIFICATIONS OF ERROR

1.

The court erred in directing a verdict in favor of the defendant.

2.

The court erred in denying appellants' motions for a new trial.

3.

The court erred in entering a judgment for the appellee.

ARGUMENT

It is the position of appellants that under the facts and cir-

cumstances set forth above appellee is liable to appellants notwithstanding lack of privity of contract.

The trial below, and this appeal is predicated upon the proposition that the defendant was negligent in recommending and selling Elgetol and giving instructions as to the use thereof as a mildew control at a time when it knew or in the exercise of reasonable care should have known that the product was unsafe for such purpose.

It is our position that by going into the field and contacting the growers and recommending and representing to the growers Elgetol as a mildew control, the appellee, California Spray-Chemical Corporation, assumed the duty to use due care and that when appellants purchased Elgetol indirectly from the appellee and used it according to appellee's instructions and relied upon appellee's recommendations, representations and instructions, the lack of a direct contractual relationship between the parties does not bar appellants' action. The court below found that under such circumstances notwithstanding the representations of appellees and appellants' reliance thereon and notwithstanding the fact that appellants knew or in the exercise of reasonable care should have known at the time such representations were made that the product was dangerous and wholly unsafe to use for the purpose recommended, there must be direct contractual relationship in order to affix legal liability upon the appellee. It was for that reason that the court directed a verdict in favor of the appellee, entered judgment and overruled appellants' motion for new trial. (R. 263 et seq.).

I.

LIABILITY OF SELLER FOR BREACH OF WARRANTY

Had appellants sued appellee solely upon breach of warranty, then it would have been incumbent on appellants to prove a direct contractual relationship between the parties, for a warranty necessarily implies a contract of some kind. The leading case on this subject in the State of Washington is the case of *Mazetti vs. Armour & Co.*, 75 Wash. 622, 135 Pac. 633. In this case the court laid down the rule in the State of Washington to be:

> "It has been accepted as a general rule that a manufacturer is not liable to any person other than his immediate vendee; that the action is necessarily one upon an implied or express warranty, and that without privity of contract no suit can be maintained; that each purchaser must resort to his immediate vendor. To this rule, certain exceptions have been recognized: (1) Where the thing causing the injury is of a noxious or dangerous kind; (2) where the defendant has been guilty of fraud or deceit in passing off the article; (3) where the defendant has been negligent in some respect with reference to the sale or construction of a thing not imminently dangerous."

Were appellants claiming breach of warranty, then, of course, there could be no recovery, unless the case comes within one of the exceptions. However, it should be borne in mind that a seller may be held liable either on the theory of negligence or on the theory of breach of express warranty. It is on the theory of negligence that appellants rely, not warranty.

The third exception stated in the Mazetti case is, of course, actually not an exception, but the alternative rule here contend-

ed for, namely, that the seller may be liable for negligence as well as breach of warranty, and, in such case, privity is beside the point, for a tortious act does not necessarily depend on the existence of a contract. Therefore, the cases holding that privity is essential for an action upon breach of warranty are not applicable to the case at bar.

II.

LIABILITY OF SELLER FOR TORT IN THE SALE OF A PRODUCT

As pointed out in the case of *Mazetti vs. Armour & Co.*, 75 Wash. 622, the seller is liable where the defendant has been guilty of fraud or deceit or where the defendant has been negligent with respect to the sale of the articles sold even though there is no privity of contract.

There are two cases applying this rule, which are, in our opinion, decisive of the case at bar. These two cases are *E. I. Du Pont de Nemours & Co. vs. Baridon*, 73 F. 2d 26 (CCA 8th Circuit) and *Ebers vs. General Chemical Co.*, 310 Mich. 261, 17 N. W. 2d 176.

In the Baridon case, the Du Pont Company manufactured and marketed a patented product known as "Semesan" which it advertised as a seed disinfectant. The plaintiff heard an agent of defendant recommend the semesan for the treatment of gladiolus bulb and bulblets and had read Du Pont's literature advocating such use. The plaintiff purchased semesan from a dealer and used it upon his bulbs. These bulblets were virtually de-

stroyed. The court held that there could be liability even though there was no privity of contract. The court said:

"The defendant, however, contends that, because its product was intended to affect only plant life, and property alone was subject to injury, it owed no duty to the plaintiff, *since it had no contact with him.* With that contention we do not agree. Through its *advertising and literature the defendant had expressly invited the plaintiff and other growers to use its product for the purpose of disinfecting bulbs and bulblets, and, since it had undertaken to direct the manner in which it should be used, the user had a right to assume that the company had exercised such care as an ordinarily prudent manufacturing chemist would usually have used in giving the directions for the use of such a product,* and had not knowingly prescribed a use which would destroy their plants.

"A rule which would permit a manufacturing chemist, who offered his product to the public for use in the treatment of plants or animals, to so carelessly prepare his product or to so carelessly direct the manner in which it was to be used as to destroy or injure the property of one who purchased it from a dealer and who in ignorance of its dangers used it for its intended purpose and in accordance with the directions of the manufacturer, and which would deny to the persons whose property was injured any redress, although the destruction of his property was the natural, probable, and almost certain consequence of the manufacturer's negligence, *should not, we think, receive the sanction of this or any other court.* Our conclusion is that a manufacturer of a proprietary product intended for the specific purpose of preventing or curing the diseases of plants, animals, or human beings, which product when properly used for its intended purpose is either harmless or beneficial, but which when improperly used will cause or is likely to cause material injury, who undertakes to direct or recommend the manner in which it shall be used, owes the duty to those whom the manufacturer, through its advertising and representations, invites to purchase and use the product, of exer-

cising reasonable care commensurate with the dangers involved in giving such directions and in the making of such recommendations. The manufacturer is not an insurer that in every instance and under all circumstances no injury will result from the use of his product as directed or recommended, but *if he knows or in the exercise of reasonable care should know that if his product is used as directed or recommended it will cause or be likely to cause, material injury, then he is liable to any person who, in reliance upon his representations, directions and recommendations, uses the product for the purpose and in the manner directed and recommended by the manufacturer and who suffers injury as a direct result,* unless it appears that the user also knew or in the exercise of reasonable care should have known that the use of the product would be injurious or would be likely to cause the injuries complained of." (Italics ours)

The material facts of the case at bar are on all fours, except that in the case at bar the appellee is not the manufacturer. Under the circumstances this makes no difference. *Bock vs. Truck & Tractor, Inc.*, 18 Wash. (2d) 458, 139 P. (2d) 706.

We call the court's attention to the fact that the spray material used by appellants was manufactured solely as a dormant spray. The appellee took this product and, through its own agents, recommended that it be used after the dormant stage, during the "pink" stage and the "calyx" stage, at which time the blossoms are subject to destruction by such a spray.

In the Ebers case (17 N. W. 2d 176) the plaintiff purchased through a dealer a spray material manufactured and distributed by the defendant and applied the same upon his peach trees in order to control the peach tree borer. The defendant had recommended the product as a control of peach tree borer. The

plaintiff had relied upon that recommendation and had used the material upon his trees causing their injury. The trial court directed a verdict for the defendant, as in the case at bar, on the grounds that there was no privity of contract. The Supreme Court of Michigan reversed the court holding that privity was not necessary to recovery. There was evidence that the material had been tested in Georgia where it worked very well, but that it had not been tested in Michigan. There was evidence that the use of the material in Michigan was injurious to the trees. The court said:

> "This was a representation by defendant that, if used as directed, its product E-D-E was safe and would not kill peach trees. If it was negligent in placing such product on the market in Michigan without proper field tests to determine its effect on peach trees in this State, or if it gave improper directions for the use and application of the product, it cannot escape responsibility for such negligence merely by adding a disclaimer of warranty to its representation of safety. Although plaintiff claims under the theory of an implied warranty, the real question is whether or not defendant was negligent. * * * Defendant further contends that it cannot be held liable because there was no privity of contract between it and plaintiff. * * * *Under such representation and with knowledge that its product was inherently dangerous, it was defendant's duty to use reasonable care and precaution to protect ultimate purchasers and users, including plaintiff, from injury.*" * * * What caused the injury to plaintiff's trees? Was it caused by the product E-D-E, or by weather conditions, or by other factors? The testimony of the several entomologists indicates that they were uncertain as to the cause of the injury. If it is determined that the injury was caused by E-D-E, then the further question arises as to whether or not defendant was negligent in distributing such product in Michigan without proper field tests having been made in this State to

determine its effect on peach trees. * * * Such questions of fact should have been submitted for jury determination."

It is quite clear that the facts adduced by the appellants in the case at bar bring them within the ruling of the two cases just discussed. The trial court conceded that the two cases were sound authority for the position taken by appellants, but that he was bound by the law of the State of Washington which required privity. (R. 263-5).

III.

THE WASHINGTON CASES

It is our position that the law pronounced by the Ebers case and the Baridon case is also the law of the State of Washington. An examination of the cases involving privity decided by the Supreme Court of the State of Washington will show that it has not yet been confronted with a case such as the case at bar. An analysis of the principal Washington cases will, we believe, show that upon presentation to the Supreme Court of the State of Washington of a case similar to the case at bar, the same law will be applied as was applied in the Ebers and Baridon cases. We will now consider the principal Washington cases on the subject.

As pointed out above, the Mazetti case (75 Wash. 622) on which the court below relied clearly holds that in the event of fraud or negligence in the sale of a product the seller may be liable though not in privity with the plaintiff.

A case which comes decidedly close to the case at bar is the

case of *Baxter vs. Ford Motor Co.*, 168 Wash. 456, 12 P. (2d) 409, 15 P. (2d) 1118. In that case the plaintiff purchased a Ford automobile from a Ford dealer. When driving the car a pebble was thrown against the windshield, breaking the same and injuring the plaintiff's eye. Plaintiff brought suit against the Ford Motor Company and offered to prove that the car was sold with the representation that the windshield would not fly or shatter, which statement was made by the Ford Motor Company through its literature. The trial court excluded the evidence and sustained a challenge to the sufficiency of evidence. In granting a new trial, the court said:

> "Since the rule of caveat emptor was first formulated, vast changes have taken place in the economic structures of the English speaking peoples. Methods of doing business have undergone a great transition. Radio, bill boards and the products of the printing press have become the means of creating a large part of the demand that causes goods to depart from factories to the ultimate consumer. *It would be unjust to recognize a rule that would permit manufacturers of goods to create a demand for their products by representing that they possess qualities which they, in fact, do not possess; and then, because there is no privity of contract existing between the consumer and the manufacturer, deny the consumer the right to recover if damages result from the absence of those qualities,* when such absence is not readily noticeable. * * * *The rule in such cases does not rest upon contractual obligations, but rather on the principle that the original act of delivering an article is wrong,* when, because of the lack of those qualities which the manufacturer represented it as having, the absence of which could not be readily detected by the consumer, the article is not safe for the purposes for which the consumer would ordinarily use it.

It is, of course, true that the Baxter case involves a manufacturer where of course the case at bar involves a distributor. It is also true that the Baxter case involves a personal injury where in the case at bar we have injury to crops. These differences we submit are not material and have no real bearing on the fundamental questions here involved. Where the distributor recommends the use of a product for some other and different purpose than the one for which it was manufactured, the distributor in effect takes the position of manufacturer and becomes responsible for its use.

In the case of *Bock vs. Truck & Tractor, Inc.*, 18 Wash. (2d) 458, 139 P. (2d) 706, a dealer in second-hand motor vehicles undertook to overhaul and recondition a car which later injured a third party. The court said:

> "The question presented by these facts is whether, under such circumstances, the third person may recover from the dealer damages for personal injuries sustained by reason of the defective condition of the truck. * * * We have declared, however, that a *manufacturer* of motor vehicles may be held liable, to one purchasing a *new* automobile from the manufacturer's regular dealer, for breach of the manufacturer's warranty concerning the nature of certain equipment upon the vehicle. *Baxter vs. Ford Motor Co.*, 168 Wash. 456, 12P (2d) 409, 15P (2d) 1118, 88 A. L. R. 521: * * * The question with which we are now more particularly concerned is whether, upon a set of facts such as are stated in the complaint herein and admitted by demurrer to be true, a dealer in used, or secondhand, motor vehicles, may be held liable to a third person for injuries caused by the defective condition of such vehicle. * * * It must be conceded that there are some earlier cases which hold contrary to the decisions and texts from which we have

previously quoted. The opposing view is rested upon lack of privity or upon the argument that to adjudicate liability in cases not founded upon contractual rights would subject manufacturers and dealers to unreasonable burdens and would create a source of unconscionable litigation. *Those cases, however, are not in harmony with the principle now firmly established in this state, that liability of the instant nature does not rest upon a contractual obligation, but upon tort for a wrong committed. Baxter vs. Ford Motor Co.,* supra. * * * *such duty rests not upon a contractual obligation, but rather on the principle that the delivery of a motor vehicle lacking in those qualities which the dealer represents it to have, or impregnated with defects which render the vehicle unsafe for its intended use and which defects the dealer could have ascertained by the exercise of reasonable care, constitutes an actionable wrong as to all those who suffer injury therefrom.* * * * It goes without saying, of course, that the wrong is the more pronounced and reprehensible where the sale of the motor vehicle is accompanied by positive representations by the dealer that the vehicle has been completely overhauled and reconditioned, is fit and safe and proper for operation upon the highways, and carries a guaranty of safety and fitness."

It will be seen that from the foregoing that the decision of the Bock case is to the effect that the ruling in the Baxter case is not limited solely to manufacturers. It is also to be noted that liability exists for negligence as well as for fraud and deceit in the State of Washington *even though there be no privity.* It is also to be noted that there is no allegation of fraud in the complaint in the Bock case.

In the case of *Kramer vs. Carbolineum Wood Preserving Co.,* 105 Wash. 401, 177 Pac. 771, the plaintiff purchased material from the Portland Seed Company distributed by the defendant and applied the same to his prune orchard and suffered a loss of

a number of trees. There was no showing that the defendant had been guilty of any negligence in the manufacture or sale of the product. There was no showing that the product had not been tested. There was no showing that the defendant had made any recommendations or representations concerning the product. There was no showing that the defendant's representative had contacted the plaintiff and recommended the use of the product. The court in sustaining a directed verdict said:

> "The appellant relies upon the case of *Mazetti vs. Armour & Co.*, 75 Wash. 622, 135 Pac. 633, Ann. Cas. 19156140, 48 L. R. A. (N. S.) 213. * * * It is at once apparent that the Mazetti case does not sustain a recovery in this case, for this case does not fall within any one of the exceptions named there. The Avenarius Carbolineum is not shown to be of a noxious or dangerous kind. It was not shown that the respondent had been guilty of fraud or deceit in passing off the article, or that the respondent had sold, or ever had possession of, the article purchased by the appellant; *and it was not shown that the respondent had been negligent in any respect with reference to the sale of the article* purchased by the appellant and used upon his fruit trees. Not coming within any of these exceptions, the general rule must apply, that, where there is no privity of contract between the appellant and the respondent with reference to the sale of the Avenarius Carbolineum, no liability exists against the respondent."

We cite this case to point out to the court that the Supreme Court of the State of Washington in refusing to allow recovery in the Kramer case did not do it on the ground that injury to property was involved rather than injury to the person, nor did the court place its ruling upon the ground that the defendant was not a manufacturer, but placed it upon the ground that

there was no showing that the defendant had ever made any recommendations or representations to the plaintiff and *upon the ground that there was no showing that the defendant was guilty of any negligence in connection with the product.*

Another principle case in the State of Washington is the case of *Cochran vs. McDonald*, 23 Wash. (2d) 348; 161 P. (2d) 305. The Winterine Manufacturing Company manufactured an anti-freeze; it did not do business in the State of Washington and was not a defendant in the case. The Winterine Manufacturing Company sold the antifreeze in original containers to the defendant who in turn sold the antifreeze to the service station from which the plaintiff purchased the antifreeze. The label on the antifreeze guaranteed that if the product was used as directed it would not cause damage. The plaintiff used the product and his motor was ruined. The plaintiff sued the defendant who was a distributor, not on the theory of negligence, but first, on the theory of express warranty, and secondly, on the theory of implied warranty. The court held that there could be no liability on the part of the defendant to the plaintiff for the reason that there was no privity of contract. The court dismissed the theory of express warranty (printed on the container) for the reason that there was no evidence that plaintiff adopted the warranty and said "by merely selling the goods he does not accept the manufacturer's warranty as his own."

The court dismissed plaintiff's contention with regard to breach of implied warranty on the theory that there was no

privity of contract and that the case did not come within any exception of the Mazetti case. The court said:

> "The respondent purchased the antifreeze from the manufacturer, and each gallon quantity was in a sealed container. It was covered by an express warranty of the manufacturer. *There was nothing about the article to indicate that it would be dangerous when used for the purpose intended, and respondent had no reason to anticipate it was not as represented by the warranty.* The respondent was not called upon to analyze or test the antifreeze before selling it to the dealers in that class of goods. *There was nothing which even remotely put him on inquiry as to its quality or condition.*"

It is to be observed at once that the situation presented in the Cochran case is distinguishable from the case at bar. In the case at bar the product was not covered by an express warranty from the manufacturer. The fact that the product was manufactured as a dormant spray and had been previously employed as a bloom killer or thinner would, the jury could find, definitely indicate to the appellee that it would be inherently dangerous when used in the "pink" and in the "calyx" for a different purpose. Appellee therefore had every reason to anticipate that trouble might result from its recommended use of the product. Certainly under the evidence the jury could have so found. *The point here is that the appellee, even though a wholesaler, directly contacted the ultimate purchaser and recommended the use of the spray material for a purpose wholly different from that for which it was manufactured.* Since appellee recommended the use of the spray as a mildew control and not as a dormant spray and since appellee undertook to write formulae for the use of the product and instruct on the strength of ap-

plication and time and manner of application, appellee was very definitely called upon under the cases above cited to find out about the product before recommending it to the growers as a mildew control. In the Cochran case just cited the defendant did not recommend and direct the use of the anti-freeze for some other purpose. The defendant therefore in that case was not called upon as the court said to test the product; nor was there any contention or any evidence introduced in the Cochran case to the effect that defendant was negligent in any respect. The privity doctrine was properly applied in the Cochran case but the ruling in that case, because of the difference in the salient facts, is not applicable to the case at bar.

In the case of *Dobbin vs. Pacific Coast Coal Co.*, 25 Wash. (2d) 190, 170 P. (2d), 642, the Round Oak Company manufactured a furnace which was sold to the Pacific Coast Coal Co., the defendant. The defendant as a distributor sold for cash the furnaces to the Allied Home Appliances which in turn sold the furnace to a contractor by the name of Tucker who in turn sold the furnace, installed in a house, to the plaintiff.

The issues had been framed and the case tried in the court below on the theory of breach of implied warranty of fitness. After the conclusion of the trial and on the plaintiff's motion for new trial, plaintiff for the first time contended that the defendant Pacific Coast Coal Company had been guilty of fraud. The Supreme Court pointed out that although there was no allegation of fraud in the complaint and although there was nothing

in the 350 pages of the trial record to indicate that the trial court or the parties considered fraud an issue.

> "Nevertheless, we feel that, under our rules and former decisions, the trial court had the right to hold that an issue of fraud was created by the evidence."

The trial court had entered a judgment in favor of the plaintiff holding that there had been a fraud in passing off a furnace. The Supreme Court in reversing the judgment of the trial court found that there was no fraud, and that, since there was neither fraud nor negligence, there was no exception to the privity rule as stated in the Mazetti case within which the plaintiff could come. The court said:

> "But, in our comparatively early decision in *Mazetti vs. Armour & Co.*, 75 Wash. 622, 135 Pac. 633, Ann. Cas. 1915C, 140, 48 L. R. A. (NS) 213, it is pointed out that where there is no contractual privity, a manufacturer may, under certain states of fact, be held liable in a tort action. * * * In the recent very comprehensive and useful opinion cited by the trial court in its memorandum decisions *(Bock vs. Truck & Tractor, Inc.*, 18 Wn. (2d) 458, 139 P. (2d) 706), an extended quotation is made from Judge Cardozo's opinion in the case of *MacPherson vs. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050, Ann. Cas. 1916C, 440, L. R. A. 1916 F, 696. It is said in the opinion 'There is no claim that the defendant knew of the defect and willfully concealed it. . . The charge is one, not of fraud, but of negligence. The question to be determined is whether the defendant owed a duty of care and vigilance to any one but the immediate purchaser.'
>
> "The Bock case relies largely upon *Flies vs. Fox Bros. Buick Co.*, 196 Wis. 196, 218 N. W. 855, 60 A. L. R. 357, which was plainly a negligence case, and, although there was some consideration of alleged false representations in

the Bock case, *it was in fact decided on the theory of negligence.* See paragraph (5) of the opinion in 18 Wn. (2d) at page 475."

In discussing the case of *Baxter vs. Ford Motor Co.*, 168 Wash. 456, 12 P (2d) 409, 15 P (2d) 1118, the court in the Dobbin case said:

> "It is clearly the opinion of the court that, if the plaintiff in that case could prove, by clear, cogent, and convincing evidence, (1) that the Ford Motor Company issued catalogues representing that the windshields of their cars were nonshatterable; (2) that plaintiff saw and read those representations; (3) that he purchased a car of that make in reliance upon them; and (4) that the windshields of the car shattered upon a slight impact, by which shattering he was injured, he would be entitled to a recovery against the manufacturer on the ground of fraud, although there was a complete lack of contractual privity."

There was no evidence of negligence or that the Pacific Coast Coal Company recommended that the furnace be used for some other different purpose than the one intended by the manufacturer. The only evidence of fraud was a circular put out by the Pacific Coast Coal Company but there was no testimony that the plaintiff ever saw or relied upon the representation contained in the circular. The court said:

> "We have checked and rechecked the record, and we find the appellant is correct in saying that there is no evidence whatever therein that the plaintiff saw the circular until long after he had purchased the Tucker house. It is, therefore, obvious that no finding of fraud could be predicated on any representation in Exhibit A, even if false. Proof of reliance upon a false representation is an indispensable element in a fraud action."

It is apparent that the Dobbin case is not contrary to the Ebers *(Ebers vs. General Chemical Co.*, 310 Mich. 26, 17 N. W. (2d) 176) or the Baridon *(E. I. Du Pont de Nemours & Co. vs. Baridon*, 73 F (2) 26) cases, but expressly recognizes the theory of those cases, namely, that when the wholesaler is guilty of negligence in passing off the article, there may be liability even though there is no privity of contract. The point again is that in the Dobbin case the defendant wholesaler was not contacting the user directly and recommending and instructing in the use of the product which was manufactured for an entirely different purpose without properly testing the same for the new purpose, whereas we do have those facts in the case at bar.

From an examination of the foregoing cases it is apparent that a case such as the Ebers case or the Baridon case or such as the case at bar, has never been presented to the Supreme Court of the State of Washington. The nearest to these cases is the Baxter case and the Bock case which cases have not been overruled by subsequent cases, but have been quoted and relied upon by subsequent cases. A careful analysis shows that when the Washington Court is presented with a case such as the case at bar it will follow the rule in the Ebers case and the Baridon case, namely, that where a distributor recommends directly and personally to the user there will be liability notwithstanding lack of privity of contract either where there has been representations which were not true or where there has been negligence. We believe that there were sufficient facts introduced to go to the Jury. The appellee should not be permitted to go to the

growers personally recommending the product and directing the use of it and then escape liability for false representation or for negligence, as the case may be, upon the grounds of lack of privity. We respectfully submit that appellants are entitled to have their cases go to the Jury.

The court below stated, in effect, he would have submitted the case to the Jury on the authority of the Ebers and the Baridon cases, but felt that the Washington law was to the contrary. We are convinced that a careful analysis of the Washington cases clearly shows not only that the law of the State of Washington is not opposed to the Ebers and Baridon cases but on the contrary is in harmony therewith, and that when the Washington court is submitted a case such as this it will say, as was said in the Baridon case:

> "A (contrary) rule . . . should not, we think, receive the sanction of this or any other court."

We respectfully submit that the trial court erred in granting the motion for a direct verdict, in entering judgment thereon for the defendant, and in failing to grant appellants' motion for new trial.

Respectfully submitted,

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Nat U. Brown